STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 20, 2003
v DARRYL N. HINSON, Defendant-Appellant.	No. 237362 Wayne Circuit Court LC No. 01-001287-01
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v FREDRIC R. GILBRETH, Defendant-Appellant.	No. 237484 Wayne Circuit Court LC No. 01-001287-03
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v BOBBY W. GILBRETH, Defendant-Appellant.	No. 237486 Wayne Circuit Court LC No. 01-001287-02

Before: Cooper, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

These three consolidated appeals arise out of a home invasion and assaults. All three defendants were charged with first-degree home invasion, MCL 750.110a(2), and two counts each of assault with intent to commit great bodily harm less than murder, MCL 750.84. They

were jointly tried before a single jury. Defendant Darryl N. Hinson was convicted of first-degree home invasion and two counts of the lesser included offense of felonious assault, MCL 750.82. He was sentenced to five to twenty years' imprisonment for the home invasion conviction and one to four years' imprisonment for each of the assault convictions. Defendant Fredric R. Gilbreth was convicted of the lesser included offenses of third-degree home invasion, MCL 750.110a(4), and felonious assault (two counts). He was sentenced to thirty months to five years' imprisonment for the home invasion conviction, and two to four years' imprisonment for each assault conviction. Defendant Bobby W. Gilbreth was convicted of the lesser included offenses of third-degree home invasion, felonious assault, and aggravated assault, MCL 750.81a. He was sentenced to probation for the home invasion conviction, six to twelve months in jail for felonious assault, and twelve months in jail for aggravated assault. All three defendants appeal as of right. We affirm.

I. Factual Background

Complainants Bradley Strayer and Edward Sawicki rented a home from defendant Hinson's wife, who was also Sawicki's aunt. Defendant Hinson wanted the two complainants to move out of the house within two days and threatened to harm them if they did not leave. Hinson got into an altercation with Strayer, which included a fistfight in the middle of the street. Hinson then told the complainants that they would have to leave the house immediately or he would return and kill them.

The three defendants later returned to the house. They pounded on the front and back doors of the house, and eventually Hinson broke through the back door and entered the house. Hinson attacked Strayer with a metal flashlight as the other two defendants continued pounding on the front door. Sawicki grabbed a curtain rod and struck Hinson with it, and Strayer got a hammer and struck Hinson.

The pounding at the front door stopped as defendant Bobby Gilbreth came through the back door and hit Strayer in the head with a fire extinguisher. Strayer tackled Bobby Gilbreth and they wrestled to the back landing. Defendant Fredric Gilbreth then came through the back door, and he hit Strayer in the head with a baseball bat. Strayer was such a bloody mess that his wife and Sawicki thought he was dead. Defendants fled the house.

After defendants left the house, one of them threw the fire extinguisher through a window and nearly hit Sawicki. All three defendants then reentered the house, and Fredric Gilbreth hit Sawicki with the baseball bat. Sawicki attempted to a flee to another room with Bobby Gilbreth in pursuit. Bobby Gilbreth caught up with Sawicki and bit his thumb. Sawicki also was hit on the back of the head; he believed that Bobby Gilbreth hit him with a piece of a cast iron stove that Sawicki had seen in Gilbreth's hand. One of the defendants also stabbed Sawicki in the forehead with a knife.

II. No. 237362 – Appeal of Defendant Hinson

Defendant Hinson raises three issues on appeal.

A. Effective Assistance of Counsel

Defendant argues that he was denied the effective assistance of counsel because his trial attorney failed to call defendant's wife – the landlord – as a witness. In a post-trial affidavit, Mrs. Hinson stated that she had informed defense counsel that she did not sign a lease to rent the home to the complainants. Defendant stated in an affidavit that trial counsel told him that it was not necessary to call his wife as a witness because of weaknesses in the prosecution's case.

Defendant has failed to overcome the heavy burden of showing that his trial counsel's performance was so deficient that it denied him the effective assistance of counsel. *People v Pickens*, 446 Mich 298, 314-315; 521 NW2d 797 (1994). Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and an appellate court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Defendant has not presented the trial attorney's explanation for failing to call Mrs. Hinson as a witness, and therefore has not overcome the presumption that counsel's decision was a matter of trial strategy. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *Rockey*, *supra* at 76-77. Moreover, considering the substantial evidence indicating that the complainants were actual tenants and had been assaulted, defendant has failed to show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

B. Jury Instructions

Defendant argues that the trial court committed error requiring reversal in failing to define in jury instructions the difference between a "felony assault" and a "misdemeanor assault" for purposes of distinguishing between first-degree and third-degree home invasion. Defendant did not object below, so we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). We find no plain error.

The standard jury instructions had not been revised to incorporate recent amendments of the home invasion statute.[1] Accordingly, without objection, the court crafted an instruction which essentially quoted the statute. The jury thus was instructed that first-degree home invasion could be shown if a defendant broke and entered an occupied dwelling with intent to commit a "felony, assault, or larceny," or if one of those acts was committed while entering, while inside, or while exiting the dwelling. MCL 750.110a(2). By contrast, third-degree home invasion would be shown if a defendant broke and entered with intent to commit a misdemeanor, or if defendant committed a misdemeanor while entering, while inside, or while exiting. MCL 750.110a(4).

[1] The instructions were updated after this trial. See CJI2d 25.2a, History.

The premise of defendant's argument is faulty. He assumes that a misdemeanor-level assault is a predicate for third-degree home invasion. Applying the plain language of the statute, however, *any* assault (or any larceny), whether a felony or misdemeanor, would support a conviction for first-degree home invasion. All other felonies support a first-degree conviction, while all other misdemeanors would support only a third-degree conviction. The Legislature, apparently cognizant of the dangers posed by illegal entry into an occupied dwelling with intent to commit any type of assault, clearly intended to apply heightened punishment to such conduct. Accordingly, the trial court did not plainly err when it failed to distinguish between "felony assault" and "misdemeanor assault" because the statute does not recognize or impose that distinction. Moreover, defendant suffered no prejudice, where the jury found him guilty of a felony assault, which in turn supported a conviction for first-degree home invasion. MCL 769.26.

C. Prosecutor's Closing Argument

Defendant Hinson argues that the prosecutor shifted the burden of proof in closing argument by arguing that the state was precluded from calling Mrs. Hinson as a witness due to spousal immunity. A co-defendant objected, which preserves the issue for this defendant. *People v Griffin*, 235 Mich App 27, 41 n 4; 597 NW2d 176 (1999).

Defendant argued in closing:

> I contend that Mr. Hinson went very peacefully. I say that because his wife was waiting in the car. She is in the van waiting for him. He goes to the house. He is ambushed by Sawicki and by Strayer, with not only weapons that repel people, but weapons that kill people.

A codefendant argued in closing that the lease was not completely filled out and the prosecutor had the burden of establishing the authenticity of the lease:

> They are proponents of this document. They have the burden to show that this is a viable document. We don't have to prove anything about it. That's their claim right here. So do we have an obligation to present Angela Hinson to indicate ["]yes, that's my signature["]? No, we don't have that obligation. He has the obligation. And if he thought that . . . Angela Hinson was going to answer that question the way he wanted it answered, he would have subpoenaed her, because they have the obligation to prove that they are the proponents of this lease, and that this lease is legitimate, because this is their claim.

The prosecutor informed the court that he intended to respond to the closing arguments because there was no evidence of an ambush. He specifically planned to argue that because the wife did not testify, defendant's suggestion of an ambush lacked credibility. The court warned the prosecutor about the risk of shifting the burden of proof.

During rebuttal argument, the prosecutor commented upon his obligation to produce witnesses:

> Defense counsel . . .blames me for not producing Mr. Hinson's wife. Now, I don't think we have any lawyers here [on the jury]. But you may all have heard of things called attorney-client privilege. Those are things that cannot be –
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> MS. CAMERON [defense counsel]: Objection, Judge, he can't comment on anything like that.
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> MR. CAMERON [prosecutor]: She has blamed me for not producing a witness for which there is –
>
> THE COURT: It appears to be responsive.
>
> MR. CAMERON: I can't call his wife as a witness, there is a privilege. I can't. If, assuming in fact, it is his wife, assuming it is his wife, I can't call his wife as a witness. And then she turns around and blames me for not doing something that I can't do. That's not fair. That's not fair. People are telling you half the story.

Defendant concedes that the prosecutor's argument was "technically responsive," but maintains it still offends his right to a fair trial. We disagree. Otherwise objectionable arguments may be proper if they respond to matters raised by the defense. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977); *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Moreover, we do not find that the specific words used by the prosecutor shifted the burden of proof. The trial court properly instructed the jury that the burden of proof rests with the prosecution and that defendant is not required to prove anything.[2] The prosecutor's argument did not contradict those instructions.

We note that defendant makes the argument that there was no proof that his wife would actually invoke spousal immunity. It is unnecessary for us to analyze any spousal immunity question because the underlying theme of defendant's argument, that the prosecutor had to establish that the lease agreement was validly executed by Mrs. Hinson, is faulty and lacks merit. The issue concerning whether the complainants had a legally protected possessory right could be shown through other evidence that was in fact presented at trial such as the testimony about the payment of a deposit and rent, along with evidence that the complainants were living and staying at the house. Moreover, there was testimony that complainants executed the lease and that Mrs. Hinson signed the lease. Additionally, there was no objection to the admission of the lease into evidence. The prosecutor had thus submitted sufficient evidence to support the prosecution's burden of proof. Reversal is unwarranted.

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[2] One defense attorney also reminded the jury that the prosecutor bears the burden of proof.

III. No. 237484 – Appeal of Defendant Fredric Gilbreth

Defendant Frederic Gilbreth raises two issues on appeal. In a separate brief filed *in propria persona* under Standard 11,[3] defendant raises an additional issue regarding alleged perjury.

A. Great Weight of Evidence

Defendant argues that the verdicts were against the great weight of the evidence. This issue was not preserved by a motion for new trial. See *People v Patterson*, 428 Mich 502, 514-515; 410 NW2d 733 (1987) (in jury trials, great weight issues must be preserved by motion for new trial). Defendant argues that he preserved the issue by moving for a directed verdict at the close of the prosecutor's proofs. A motion for a directed verdict does not test the weight of the prosecutor's proofs; rather, it tests the sufficiency of those proofs. *People v Lemmon*, 456 Mich 625, 633-634; 576 NW2d 129 (1998).

Even if we were to review this unpreserved issue under *Carines*, *supra*, and to the extent that defendant is actually making a sufficiency of the evidence argument, we find no error. "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Defendant's primary focus is on the alleged inconsistent testimony relative to the elements of the crimes. As posited by defendant's trial counsel in her opening statement, the jury's primary role in this matter was to determine the credibility of two diametrically opposed versions of events. Viewing the evidence in a light most favorable to the prosecution, the prosecutor's witnesses, if believed, established the elements of each offense. We will not second-guess the question of credibility. *Lemmon*, *supra* at 637, 642-643.

B. Res Gestae Witness

Defendant argues that the prosecutor failed to exercise due diligence to produce defendant Hinson's wife (the landlord). Defendant claims that Mrs. Hinson was a res gestae witness. She was included on the prosecutor's witness list, but her name was not checked off to signify that the prosecutor intended to call her as a witness.

Defendant did not object to the prosecutor's failure to produce Mrs. Hinson. We therefore review this unpreserved issue for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763-764. We find no plain error. The prosecutor's duty to list res gestae witnesses does not include a duty to produce them for trial. MCL 767.40a; *People v Burwick*, 450 Mich 281, 288-289; 537 NW2d 813 (1995). Instead, the prosecution is obligated to provide reasonable assistance to locate witnesses *upon request*. MCL 767.40a(5). Defendant never requested assistance. Moreover, defendant speculates that Mrs. Hinson "may well have seen events or details that would have corroborated Mr. Gilbert's [*sic*] theory that he had nothing to do with the altercation and remained outside at all times." He has failed to demonstrate that Mrs.

[3] OA 1981-7.

Hinson witnessed anything or that her proposed testimony would be helpful. *People v Marcus Davis*, 250 Mich App 357, 369; 649 NW2d 94 (2002).

C. Alleged Perjured Testimony

In his supplemental brief filed *in propria persona*, defendant argues that the trial court allowed perjured testimony to be used against him.

The elements of perjury are: (1) the administration of an oath authorized by law, by competent authority; (2) an issue or cause to which the facts sworn to are material; (3) and willful false statements or testimony regarding those facts. *People v Honeyman*, 215 Mich App 687, 691; 546 NW2d 719 (1996).

Defendant cites one complainant's testimony that he was not employed at the time of the offense, although he had previously testified that he was employed. The witness admitted committing perjury in that prior testimony. This sole, isolated incident related to an immaterial point and did not affect the verdict.

Although defendant has not identified any other "perjured" testimony, the statement of facts in defendant's brief focuses on one witness' admission at trial that she did not see defendant Frederic Gilbreth in the house, which contradicted her preliminary examination testimony that defendant Hinson and his "friends" pushed one complainant down the interior stairs of the house. The reference to "friends" in the plural would have implied that both of the Gilbreth brothers were inside and pushed the complainant. We disagree that this amounts to "perjury." It is not unusual for witnesses to be impeached with earlier testimony. Defense counsel conducted effective cross-examination to bring out discrepancies. The fact that discrepancies exist does not mean that the prosecution was based on perjured testimony. Defendant has not shown that the witness' misstatement was willful.

Defendant also focused in his statement of facts on a complainant's testimony that he paid an $1800 security deposit on the house. Again, defendant does not specifically identify this as perjured testimony. Regardless, defense counsel cross-examined the witness about whether the witness had earlier testified that the deposit totaled $1600, and the witness admitted the discrepancy. Again, we do not consider such impeachment to reflect perjured testimony.

The possibility that a witness may be untruthful is not unknown to the legal system. See *Knowles v The People*, 15 Mich 408, 412 (1867) (jury is not required to disregard entire testimony on account of willful falsehood as to some portions of witness's testimony). It has led to the development of jury instructions which specifically instruct the jury that, if they determine a witness has lied, they can still rely on other testimony from that witness. CJI2d 3.6(5). That instruction was given in this case.

Defendant has not shown that the cited testimony fits the legal definition of perjury.

IV. No. 237486 – Appeal of Defendant Bobby Gilbreth

Defendant Bobby Gilbreth raises an issue challenging the jury instructions. In a separate brief filed *in propria persona* under Standard 11, defendant also raises four other issues.

A. Jury Instructions

Defendant argues that the trial court erred when it failed to sua sponte clarify for the jury that defendant would have lacked the necessary intent to commit home invasion if he reasonably believed he was coming to the defense of defendant Hinson.

The jury asked for clarification of the defense of aiding another: "Can we have the law about coming to the defense and aid of another person." The court, without objection from the parties, sent copies of prior instructions. Another note followed about twenty minutes later: "Can it be considered home invasion if a person entered in defense of another." The court discussed the matter with the attorneys present and said it intended to instruct the jury that "they have to determine this themselves, by putting the law that was given to them to the facts." Again, no objection was raised. The court then further instructed the jury as follows:

> I can only tell you this is an issue of the jury. You must apply the law as I gave it to you, to the facts. You consider the facts that were in evidence in this case and come to a determination.

Because no objection was raised, we review this issue for plain error affecting defendant's substantial rights. *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001). We find no plain error. The court had already properly instructed the jury on the elements of the offense and the appropriate defense. See CJI2d 7.22 (defense of others). The instruction given specifically addressed the issue raised by the jury's note:

> The defendant claims that he acted in lawful self-defense or defense of another person. A person has the right to use force to defend himself or another person, under certain circumstances. If a person acts in lawful self-defense or defense of others, his actions are excused *and he is not guilty of any crime*. [Emphasis added.]

Under those instructions, if defendant reasonably believed he was coming to Hinson's aid, he would have lacked the necessary intent to prove home invasion. The court appeared to believe that the jury was unsure of its authority to decide whether defendant was coming to the aid of others. There was no error in instructing the jury that they were empowered to make that factual determination. If, as it may appear in retrospect, the jury was instead seeking clarification of the relationship between the two legal concepts, we find no plain error in the court's instruction that the jury should rely on proper instructions previously given. See *People v Katt*, 248 Mich App 282, 311; 639 NW2d 815 (2001), lv gtd on other grds 466 Mich 889 (2002).

B. Alleged Perjured Testimony

Defendant raises the same issue regarding allegedly perjured testimony as raised in his brother's appeal. For the identical reasons, we find no error.

C. Breaking and Entering

Also in his brief filed *in propria persona*, defendant poses the question: "What about the other two individuals? If the door was open did they break and enter?" Defendant maintains that he entered through an already open door, and therefore did not commit a "breaking" necessary to sustain his home invasion conviction.

We find no error. The jury was instructed to consider defendant's actions in isolation and under an aiding and abetting theory. Even if defendant did not open the door to enter the house, viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to find that defendant aided and abetted his companions when they opened doors to enter the house. *Wolfe, supra* at 515.

D. Res Gestae Witness

Defendant also argues that the prosecution failed to produce Mrs. Hinson as a res gestae witness. For reasons stated earlier, we find no error.

E. Intent to Cause Great Bodily Harm

Finally, defendant argues that he did not intend to cause great bodily harm but was instead lawfully assisting others and was attempting to "arrest" the complainants. Although defendant was convicted of assaulting both complainants, he was not convicted of assault with intent to commit great bodily harm. Rather, he was convicted of the lesser offenses of felonious assault and aggravated assault.

The testimony showed that defendant hit Bradley Strayer in the head with a fire extinguisher. After defendant left the house, the fire extinguisher was thrown through a window and nearly hit Edward Sawicki. All three defendants then reentered the house, and codefendant Fredric Gilbreth hit Sawicki with a baseball bat. Sawicki attempted to a flee to another room, with defendant pursuing him. Defendant bit Sawicki's thumb. Sawicki also was hit on the back of the head; he believed that defendant hit him with a piece of a cast iron stove that Sawicki had seen in defendant's hand. One of the defendants also stabbed Sawicki in the forehead with a knife.

Whether as a principal or as an aider and abetter, when the evidence is viewed in the light most favorable to the prosecutor, a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Wolfe, supra*.

Affirmed.

/s/ Jessica R. Cooper
/s/ William B. Murphy
/s/ Kirsten Frank Kelly